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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 BARBARA CHURCH,

Civil No. 04-746-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 JO ANNE B. BARNHART,
Commissioner of Social Security,

14 Defendant.

15 _____
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1 AIKEN, Judge:

2 Claimant, Barbara Church, brings this action pursuant to
3 the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and
4 1383(c)(3), to obtain judicial review of a final decision of
5 the Commissioner. The Commissioner denied the plaintiff's
6 application for Disability Insurance Benefits (DIB) under Title
7 II of the Social Security Act, 42 U.S.C. §§401-33, and
8 Supplemental Security Income (SSI) under Title XVI of the
9 Social Security Act, 42 U.S.C. §§ 1381-83(f). For the reasons
10 set forth below, the Commissioner's decision is reversed and
11 remanded for payment of benefits.

12 PROCEDURAL BACKGROUND

13 The plaintiff protectively filed her applications for DIB
14 and SSI on June 1, 2001. Tr. 53. She alleged disability since
15 July 8, 2000, based on major depression, recurrent, severe;
16 post traumatic stress disorder (PTSD), with psychotic features;
17 attention deficit hyperactivity disorder (ADHD), hyperactive,
18 impulsive type; and mild mental retardation. Tr. 63. The
19 plaintiff's applications were denied initially and on
20 reconsideration. Tr. 29, 38. The plaintiff filed a request
21 for a hearing on October 17, 2002. Tr. 41.

22 A hearing was held on August 13, 2003, where the
23 plaintiff appeared and testified, represented by an attorney.
24 Tr. 559-609. A vocational expert also testified. Id. On
25 November 24, 2003, the ALJ issued a decision finding the
26 plaintiff not disabled within the meaning of the Social
27 Security Act. Tr. 11-25. The Appeals Council denied the
28 plaintiff's request for review, making the ALJ's decision the

1 final decision of the Commissioner. See 20 C.F.R. §§404.981,
2 416.1481, 422.210.

3 **STATEMENT OF THE FACTS**

4 The plaintiff was 39 years old at the time of the ALJ's
5 decision. Tr. 16. She has an eighth-grade education, and her
6 past work experience includes deli worker, parking lot
7 attendant, and customer service representative. Tr. 14. The
8 plaintiff alleges disability due to major depression, PTSD,
9 ADHD, Hepatitis C, and asthma. Tr. 15. The relevant medical
10 evidence is discussed below.

11 **STANDARD OF REVIEW**

12 This court must affirm the Secretary's decision if it is
13 based on proper legal standards and the findings are supported
14 by substantial evidence in the record. Hammock v. Bowen, 879
15 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more
16 than a mere scintilla. It means such relevant evidence as a
17 reasonable mind might accept as adequate to support a
18 conclusion." Richardson v. Perales, 402 U.S. 389, 401
19 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S.
20 197, 229 (1938)). The court must weigh "both the evidence that
21 supports and detracts from the Secretary's conclusions."
22 Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

23 The initial burden of proof rests upon the claimant to
24 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
25 (9th Cir. 1986). To meet this burden, the plaintiff must
26 demonstrate an "inability to engage in any substantial gainful
27 activity by reason of any medically determinable physical or
28 mental impairment which can be expected . . . to last for a

1 continuous period of not less than 12 months. . . ." 42 U.S.C.
2 § 423(d) (1) (A) .

3 The Secretary has established a five-step sequential
4 process for determining whether a person is disabled. Bowen v.
5 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
6 416.920. First the Secretary determines whether a claimant is
7 engaged in "substantial gainful activity." If so, the claimant
8 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
9 §§ 404.1520(b), 416.920(b) .

10 In step two the Secretary determines whether the claimant
11 has a "medically severe impairment or combination of
12 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
13 §§ 404.1520(c), 416.920(c) . If not, the claimant is not
14 disabled.

15 In step three the Secretary determines whether the
16 impairment meets or equals "one of a number of listed
17 impairments that the Secretary acknowledges are so severe as to
18 preclude substantial gainful activity." Id.; see 20 C.F.R.
19 §§ 404.1520(d), 416.920(d) . If so, the claimant is
20 conclusively presumed disabled; if not, the Secretary proceeds
21 to step four. Yuckert, 482 U.S. at 141.

22 In step four the Secretary determines whether the
23 claimant can still perform "past relevant work." 20 C.F.R.
24 §§ 404.1520(e), 416.920(e) . If the claimant can work, she is
25 not disabled. If she cannot perform past relevant work, the
26 burden shifts to the Secretary.

27 In step five, the Secretary must establish that the
28 claimant can perform other work. Yuckert, 482 U.S. at 141-42;

1 see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) & (f). If the
2 Secretary meets this burden and proves that the claimant is
3 able to perform other work which exists in the national
4 economy, she is not disabled. 20 C.F.R. §§ 404.1566, 416.966.

5 In the plaintiff's case, the ALJ found at step one that
6 the plaintiff had not engaged in substantial gainful activity
7 since her alleged disability onset date. Tr. 15, 24, Finding
8 2. This finding is not in dispute.

9 At step two, the ALJ found that the plaintiff had the
10 following severe impairments: major depressive disorder,
11 anxiety-related disorder, borderline intellectual functioning,
12 substance addiction disorder in reported partial remission, and
13 a hearing deficit. Tr. 16-17, 24, Finding 3. This finding is
14 not in dispute.

15 At step three, the ALJ found that the plaintiff's
16 impairments did not meet or equal the requirements of a listed
17 impairment. Tr. 18, 24, Finding 4. This finding is not in
18 dispute.

19 The ALJ determined that the plaintiff had the residual
20 functional capacity (RFC) as follows: no exertional
21 limitations; restricted to work that does not require fine
22 hearing; must avoid hazards and the ensuing possibility of
23 injury; limited to simple 1,2,3 step work; no frequent or close
24 contact with the general public or with co-workers; should not
25 be in work situations of concentrated exposure to fumes, odors,
26 or dust. Tr. 19, 25, Finding 3. This finding is in dispute.

27 At step four, the ALJ found that the plaintiff was not
28 able to perform her past relevant work. Tr. 23, 25, Finding 8.

1 This finding is not in dispute.

2 At step five, the ALJ found that, based on the above
3 residual functional capacity, the plaintiff could perform work
4 existing in significant numbers in the national economy. Tr.
5 24, 25, Finding 12. Examples of such work included small
6 products assembler, food assembler, and electronics worker.
7 Tr. 27, 28, Finding 11. These findings are in dispute.

8 The plaintiff alleges that the ALJ erred by improperly
9 rejecting the opinions of the plaintiff's treating and
10 examining physicians and improperly rejecting the plaintiff's
11 testimony.

12 DISCUSSION

13 The plaintiff claims that the ALJ erred in rejecting the
14 disability opinion of Dr. Thayer, the plaintiff's treating
15 physician. The defendant claims that the ALJ's rejection of Dr.
16 Thayer's opinion was proper and supported by substantial
17 evidence.

18 Dr. Thayer was the plaintiff's treating physician at the
19 time he gave his opinion. Treating physicians are employed to
20 cure and have greater opportunity to know and observe their
21 patients; as such their opinions are given greater weight than
22 opinions of other physicians. Rodriguez v. Bowen, 876 F.2d 759,
23 761-62 (9th Cir. 1989). However, an ALJ "need not accept a
24 treating physician's opinion that is conclusory and brief and
25 unsupported by clinical findings." Batson v. Comm'r. of Soc.
26 Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004). The ALJ may
27 reject the contradicted medical opinions of treating physicians
28 if the ALJ "makes findings setting forth specific and legitimate

1 reasons for doing so that are based on substantial evidence in
2 the record." Magallenes v. Bowen, 881 F.2d 747, 751 (9th Cir.
3 1989).

4 Dr. Thayer has been the plaintiff's primary care physician
5 since 1992. On August 2, 2003, he wrote:

6 Ms. Church has been a patient at this clinic since
7 1992. Since that time she has struggled with multiple
8 psychiatric diagnoses including depression, PTSD, anxiety
9 disorder, and substance dependence. At different times she
has been able to achieve some stability but these periods
have generally been short lived, usually a matter of
several months.

10 I do see Ms. Church as genuinely motivated to improve
her situation and working very hard to do so. However,
11 despite these efforts her difficulties have been
overwhelming.

12 Ms. Church is obviously improved when she is
successful at remaining drug and alcohol free but even
13 during these periods I feel her other diagnoses make her so
impaired that she is unemployable. She remains highly
14 anxious and this makes it hard for her to concentrate and
interferes with her relationships with others. The time
15 pressures and demands of most work situations generally
exacerbate her difficulties. Her depression can also be
16 severe and also interferes with relationships in a work
setting.

17 Tr. 545.

18 Dr. Thayer went on to say that he considered the plaintiff unable
19 to work and expected her problems to continue for at least twelve
20 months. Id.

21 The ALJ rejected Dr. Thayer's opinion based on the
22 following assertions: (1) the doctor did not address the
23 plaintiff's lack of compliance with treatment, and the
24 plaintiff's problems stem from this lack of compliance; (2) other
25 medical findings are inconsistent with his conclusion that the
26 plaintiff would be unemployable even without substance abuse; and
27 (3) the RFC accommodates the limitations stated by Dr. Thayer.
28 The defendant also states that Dr. Thayer's opinion should not be

1 credited because a medical source does not have the expertise to
2 comment on the vocational component of the plaintiff's
3 disability.

4 1. The Plaintiff's Compliance with Treatment

5 The ALJ based his rejection of Dr. Thayer's opinion in part
6 on his assertion that the doctor did not address the plaintiff's
7 lack of compliance with treatment. The ALJ went on to assert
8 "[w]ith the claimant's disinterest in following treatment, any
9 problems stem from her decision to avoid the steps that would
10 allow a return to work activity." Tr. 19. However, Dr. Thayer
11 did address these issues in his analysis of the plaintiff's
12 efforts to improve, and his conclusion was opposite that of the
13 ALJ.

14 Dr. Thayer opined: "I do see Ms. Church as genuinely
15 motivated to improve her situation and working very hard to do
16 so. However, despite these efforts her difficulties have been
17 overwhelming." Tr. 545. Dr. Thayer made this conclusion after
18 working with the plaintiff for over ten years and taking her
19 efforts in context with her problems in concentration,
20 comprehension, and anxiety. Dr. Thayer was aware of the
21 plaintiff's history; despite her problems with following
22 instructions, he concluded that the plaintiff was motivated to
23 pursue treatment.

24 Because Dr. Thayer did address these issues, the ALJ's
25 assertions that Dr. Thayer failed to address the plaintiff's
26 compliance with treatment and that the plaintiff's problems stem
27 from her failure to follow treatment were not legitimate reasons
28 for rejecting Dr. Thayer's opinion.

1 2. The Plaintiff's Substance Abuse

2 The ALJ also rejected Dr. Thayer's opinion that the
3 claimant is "unemployable" even without her substance abuse,
4 asserting that this opinion is inconsistent with other medical
5 findings. Dr. Thayer stated:

6 Ms. Church is obviously improved when she is successful at
7 remaining drug and alcohol free but even during these
8 periods I feel her other diagnoses make her so impaired
9 that she is unemployable. She remains highly anxious and
10 this makes it hard for her to concentrate and interferes
 with her relationships with others. The time pressures and
 demands of most work situations generally exacerbate her
 difficulties. Her depression can also be severe and also
 interferes with relationships in a work setting.

11 Tr. 545.

12 The ALJ countered this statement with an example of improvement
13 on the part of the plaintiff: during a period of sobriety, the
14 plaintiff had an appointment where Dr. Vinocur found her to be
15 well groomed with good eye contact, clear and goal directed
16 thought processes, appropriate thought content, fair insight and
17 judgment, and normal psychomotor activity. Tr. 19. The ALJ
18 stated that this medical finding was inconsistent with Dr.
19 Thayer's opinion that although the plaintiff improves in her
20 ability to function when clean and sober, this improvement is not
21 substantial enough to allow her to work. Tr. 19.

22 However, the record and the significant weight due Dr.
23 Thayer's opinion support crediting it. At another appointment,
24 Dr. Vinocur noted increased depression even though the plaintiff
25 had been clean and sober for six months. Tr. 354. Therapist
26 Valrejean observed that the plaintiff exhibited depression,
27 agitation, scattered thoughts, and very poor memory and
28 concentration even though she was "maintaining longest recovery

1 period ever." Tr. 336. Therapist Valrejean assigned the
2 plaintiff a GAF of 49 at that time. Tr. 337. A GAF of 41-50
3 indicates "serious symptoms (e.g. suicidal ideation, severe
4 obsessional rituals, frequent shoplifting) or any serious
5 impairment in social, occupational, or school functioning (e.g.
6 no friends, unable to keep a job). DSM-IV-TR, 4th ed. (2000), at
7 34. This is all evidence supporting Dr. Thayer's opinion;
8 therefore, the ALJ erred in rejecting it on the basis that it was
9 not supported by other medical findings. Furthermore, as the
10 plaintiff's treating physician for over ten years, Dr. Thayer is
11 in the best position to assess variations in the plaintiff's
12 ability to function. His opinion about her overall ability to
13 function is entitled to significant weight, and the ALJ erred in
14 failing to give this opinion the weight it was due.

15 3. The Residual Functional Capacity Assessment (RFC)

16 The ALJ found that the limitations given by Dr. Thayer and
17 others had been accommodated in the RFC assessment, and stated
18 that this also was a basis for rejecting Dr. Thayer's disability
19 opinion. Tr. 20. The plaintiff argues that the limitations the
20 ALJ addressed did not reflect the severity of the plaintiff's
21 symptoms and that the ALJ failed to take into account some of the
22 plaintiff's additional limitations.

23 The ALJ stated that the plaintiff's concentration
24 difficulties were remedied by the restriction to simple work
25 tasks, the problems with relationships were addressed by the
26 restriction to minimal contact with the public and co-workers,
27 and that time pressure and demands were eliminated by the
28 restriction to simple work activity. Tr. 20.

1 Regarding the plaintiff's concentration difficulties, DDS
2 Dr. Bates-Smith found that the plaintiff would have moderate
3 limitations in her ability to complete a normal work-day without
4 interruptions from psychologically based symptoms, and to perform
5 at a consistent pace without an unreasonable number and length of
6 rest periods. Tr. 478. Dr. Thayer agreed with this limitation,
7 although at a greater level of severity. Tr. 545. However, this
8 limitation was not included in the ALJ's findings. The
9 vocational expert testified that the plaintiff would not be able
10 to maintain competitive employment if she was distracted for too
11 much of the day (twenty percent). Tr. 591. The simple work task
12 restriction given by the ALJ to remedy the plaintiff's
13 concentration difficulties did not address these interruptions or
14 the need for an unreasonable number of rest periods.

15 Additionally, Dr. Thayer, Therapist Valrejean, Dr. Schock,
16 and Audiologist Bloomquist all found that the plaintiff had
17 difficulties in understanding instructions and speech. Tr. 109-
18 111, 129, 337, 545. Dr. Schock and Audiologist Bloomquist opined
19 that instructions would have to be repeated to the plaintiff to
20 ensure that she understands them. Tr. 111, 129. The vocational
21 expert testified that in the unskilled jobs given in the
22 hypothetical, a person would have to remember oral directions
23 given. Tr. 602. The ALJ's findings did not include this
24 limitation in understanding instructions. Because the RFC
25 assessment did not adequately take into account the plaintiff's
26 limitations, it is not a basis for rejecting Dr. Thayer's
27 disability opinion.

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1 4. The Plaintiff's Disability Status

2 Where the Commissioner fails to provide adequate reasons
3 for rejecting the opinion of a treating or examining physician,
4 we credit that opinion "as a matter of law." The defendant
5 argues that even if Dr. Thayer's opinion is credited, it cannot
6 establish vocational disability. Dr. Thayer's opinion alone
7 would not establish vocational disability; however, when his
8 opinion is taken together with the testimony of the vocational
9 expert and the gaps in limitations assessed by the ALJ,
10 disability is established.

11 Under Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000),
12 cert. denied, 531 U.S. 1038 (2000), an award of benefits is
13 appropriate when: (1) the ALJ failed to give legally sufficient
14 reasons for rejecting evidence, (2) no outstanding issues remain,
15 and (3) it is clear the ALJ would be required to award benefits
16 when the improperly rejected evidence is credited.

17 As discussed above, the first element of the Harman v.
18 Apfel test is met because the ALJ did not give legally sufficient
19 reasons for rejecting Dr. Thayer's opinion. The second element
20 is met because the record is complete; no outstanding issues
21 remain.

22 For the third element to be met, the plaintiff's substance
23 abuse must not a be contributing factor material to the
24 determination of disability, or disability benefits are
25 prohibited. Sousa v. Callahan, 143 F.3d 1240, 1245 (9th Cir.
26 1998). According to Dr. Thayer, the plaintiff's problems with
27 anxiety and depression remain severe even when she is drug and
28 alcohol free, impairing her to such degree that she is

1 unemployable. Tr. 545. Because substance abuse is not material
2 to the plaintiff's disability, an award of benefits is not
3 prohibited. As discussed above, in combination with the
4 vocational expert testimony and the RFC assessment, disability
5 has been established. Therefore, the third element is also met
6 because it is clear that the ALJ would be required to award
7 benefits if Dr. Thayer's opinion is credited.

8 Because the Harman v. Apfel and Sousa tests are met, this
9 court will remand the plaintiff's case for an award of benefits.
10 Also, given that the plaintiff has established disability, this
11 court will not address the plaintiff's other allegations of
12 error.

13 CONCLUSION

14 The Commissioner's decision is not based on substantial
15 evidence, and is therefore reversed and remanded for payment of
16 benefits.

17 IT IS SO ORDERED.

18 Dated this 21 day of September 2005.

19
20 /s/ Ann Aiken

21 Ann Aiken
22 United States District Judge
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